No. 90-1497

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Stephen A. Weaver
1020 N. San Vicente Boulevard
West Hollywood, California 90069
Tel. (213) 854-6171

Attorney for Petitioners

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ISSUES PRESENTED FOR REVIEW

1. Can the National Labor Relations Board ("Board") single out this case and order back pay for illegal aliens in violation of its own written policies and this Court's decision in Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984), and create a fundamental conflict with the Immigration Reform and Control Act of 1986?

2. Did the Court of Appeals for the Ninth Circuit err when it (a) narrowly construed Sure-Tan and held illegal aliens are entitled to back pay if they remain within the United States (Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro), 795 F.2d 705 (9th Circuit 1986) and (b) admonished the Board in dictum that Felbro controlled here (NLRB v. Ashkenazy Property Management Corporation (Ashkenazy II), 817 F.2d 74 (9th Cir. 1987))?

3. Did the Court of Appeals for the District of Columbia err in concluding the Ninth Circuit's decision in Ashkenazy II established the law of the case that illegal aliens are

entitled to back pay even though the Ninth Circuit in Ashkenazy II denied the Union's motion to prohibit inquiry into the legal status of workers, but in dictum stated the Board should follow Felbro?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ashkenazy Property Management Corporation, d/b/a L'Ermitage Hotel; Ashkenzay Enterprises, Inc.; Ashkenazy Development Corporation; 9829 Burton Company, d/b/a L'Ermitage Hotel petition for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the District of Columbia, entered October 30, 1990.

BEST AVAILABLE COPY

OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 30, 1990 ("Judgment") was not published. The Judgment affirmed the Supplemewntal Decision and Order of the National Labor Relations Board ("SDO"), dated April 28, 1990, 293 NLRB No. 114. The SDO relied in part on NLRB v. Ashkenazy Property Managment Corporation, 817 F.2d 74 (9th Cir. 1987) ("Ashkenazy II"). These decisions are set forth in Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 30, 1990. Jurisdiction of the D.C.Circuit was pursuant to 29 United States Code Section 160(f). Petitioners filed an Application for Extension of Time in Which to File Petition for Writ of Certiorari on January 18, 1991. On

January 22, 1991, this Court entered its order extending time in which to file a petition for writ of certiorari to and including February 28, 1991.

The jurisdiction of this Court is invoked pursuant to 28 United States Code Section 1254(1).

PERTINENT STATUTES

The pertinent statutes are the National Labor Relations Act, as amended, 29 U.S.C. Sections 151, et seq (1976) (the "NLRA" or the "Act"), and the Immigration Reform and Control Act of 1986, 8 U.S.C. Sections 1324A, et seq., (the "IRCA"). Pertinent sections of these acts are set forth in Appendix A.

STATEMENT OF THE CASE

Petitioners own and operate L'Ermitage Hotel in Beverly Hills, California. This dispute arose

when many members of the housekeeping staff ("Discriminatees") refused to work and consequently were terminated. The Board concluded the Discriminatees' conduct was protected under the NLRA and issued its Original Decision and Order on February 1, 1984 and a Supplemental Order on June 6, 1984 (together "Original Order") directing Ashkenazy Property Management Corporation, dba L'Ermitage Hotel; ("APMC")[1/] to reinstate and pay Discriminatees

---

1/ Alhough the Board's Original Order was only against APMC, the General Counsel named Ashkenazy Enterprises, Inc., Ashkenazy Development Corporation and 9289 Burton Company dba L'Ermitage Hotel in the Back Pay Specification. Subsequently, Petitioners admitted that they were "joint employers" under the National Labor Relations Act. However, that admissin did not waive and has not waived Petitiones' rights to claim that except for APMC, they are not subject to the Original Order as enforced.

for their loss of earnings. L'Ermitage Hotel, 268 NLRB 744 (1984). The United States Court of Appeals for the Ninth Circuit enforced the Original Order in a decision without a published opinion. NLRB v. Ashkenazy Property Management Corp., 796 F.2d 479 (9th Cir. 1986) ("Ashkenazy I").

Concerning the compliance proceedings, the Board's General Counsel, based upon this Court's decision in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (holding illegal undocumented workers are not entitled to back pay), instructed the Board's Regional Office 31 to determine the Discriminatees' immigration status. Memorandum OM 85-57, June 26, 1985, "Ashkenazy Property Management Corporation dba L'Ermitage Hotel, Case 31-CA-10775", reprinted in 120 Lab. Rel. Rep. (BNA) 342. The Hotel and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO ("Union") objected to the General Counsel's instruction and filed a motion with the United States Court of Appeal for the Ninth Circuit, citing Local 512, Warehouse & Office Workers' Union v. NLRB

(Felbro), 795 F.2d 705 (9th Cir. 1986) (holding illegal undocumented workers who are physically present in the United States are entitled to back pay). In response to the Union's motion, the Board, without explanation, reversed its prior position and acquiesced to the Felbro decision. However, the Board limited its acquiescence to Felbro to only this case (Response of the Board to Charging Party's Motion to Compel Compliance with Panel Opinion, at 2). The Ninth Circuit denied the Union's motion, but then admonished the Board for not originally following its decision in Felbro. NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987) ("Ashkenazy II").

Before the compliance proceedings, the Board's General Counsel formally announced the Board's position that undocumented aliens are not entitled to back pay or reinstatement. Memorandum GC 87-8, October 27, 1987 "The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented

Discriminatees", reprinted in Daily Lab. Rep. (BNA), No. 219, at C-3 (Nov. 16, 1987). The compliance hearing (the "Hearing") was conducted before Administrative Law Judge Gerald A. Waxknov (the "ALJ") who granted the Union's petition to revoke Petitioners' subpoenas seeking information about the immigration status of the Discriminatees (Tr. 42-95) and excluded all testimony relating to the Discriminatees' immigration status declaring that he was bound by the Board's acquiescence to Felbro (Tr. 32-33).

Before the ALJ's Supplemental Decision, the Board's General Counsel again reiterated the Board's position that illegal aliens are ineligible for reinstatement and back pay. Memorandum GC 88-9, September 1, 1988 "Reinstatement and Back Pay Remedies for Discrimination Who Are 'Undocumented Aliens'", reprinted in Daily Lab. Rep. (BNA), No. 187 at C-6 (Sep. 27, 1988). In Memorandum GC 88-9, the General Counsel stated: "[T]he Board has conditioned reinstatement and back pay remedies

of discriminatees upon their being lawfully entitled to be present and employed in the United States." In that Memorandum, the General Counsel also stated that the Board had not acquiesced in the Felbro holding.[2/]

Without mention of the Board's announced position against Felbro, the ALJ excluded all evidence relating to the Discriminatees' immigration status, including any evidence on departures from and reentry to the United States, and awarded $58,359.64 in total net back pay to seven Discriminatees and directed Petitioners to deposit maximum back pay awards (an additional $18,335.79) in escrow for one year pending efforts to locate nine Discriminatees whose whereabouts were unknown.

[2/] Further in Memorandum GC 88-9, the General Counsel cited Felbro and then explicitly stated "the Board has not acquiesced to the view of the Ninth Circuit ..." Id. at fn. 2.

The Board entered its Supplemental Decision and Order on April 28, 1989, adopting the ALJ's Supplemental Decision and upholding the back pay awards without explaining why it had deviated from the Board's otherwise clear policy against Felbro.[3/]

[3/] ALJ's Supplemental Decision is abbreviated as "S.D."; Transcript of the Hearings as "Tr."; General Counsel's Exhibits NLRB 1071 (1986), as amended, 284 NLRB as "G.C. Exh."; and Petitioners' Exhibit as "P. Exh." Copies of the above are in the record of the D.C. Circuit. Petitioners timely filed their Petition for Review with the United States Court of Appeals for the District of Columbia Circuit on June 20, 1989. The D.C. Circuit affirmed the Board's decision on the grounds that the Ninth Circuit's decision in Ashkenazy II, which denied the Union's motion to prohibit inquiry into the legal status of workers, nevertheless was the law of the case establishing illegal aliens are entitled to back pay.

SUMMARY OF ARGUMENT

This Court in Sure-Tan held unequivocally that employees must be legally entitled to be present and employed in the United States to qualify for back pay and reinstatement remedies. The Sure-Tan holding was cemented by Congress' passage of the Immigration Reform and Control Act of 1986, 8 U.S.C. Section 1324A, et seq. ("IRCA"). The Board, however, in response to the narrow interpretation of Sur-Tan by the Ninth Circuit in Felbro, refused to permit any inquiry into the legal status of the Discriminatees. The Board's action directly contradicts the Board's own announced policies that undocumented workers are ineligible for back pay. Petitioners submit that Felbro misconstrued this Court's decision in Sure-Tan. The dubious merit of Felbro is evidenced by the Board's refusal to follow it in other cases. Also, any theoretical support for Felbro was expunged by the passage of the IRCA.

ARGUMENT

I. THE DECISION IN SURE-TAN REQUIRES THIS COURT TO OVERTURN THE BOARD'S DECISION BELOW.

A. The Board's Failure to Follow Sure-Tan is an Egregious Error.

In Sure-Tan, Inc.v. NLRB, 467 U.S. 883 (1984), this Court held that remedies for violations of the NLRA must not ignore the requirements of the Immigration and Nationality Act ("INA"). As a result, the Court held that illegal aliens are ineligible for the remedies of reinstatement and back pay in a compliance proceeding under the NLRA.

This Court expressly held that a discharged employee would not be entitled to any remedy under the NLRA for any period when he or she was not lawfully entitled to be present and employed in the United States:

[T]he implementation of the Board's

traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important congressional objective[s]', [citation omitted] -- to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing back pay, the employees must be deemed 'unavailable' for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. Cf. NLRB Case Handling Manual Sections 10612, 10656.9 (1977). [Emphasis added]

Sure-Tan, 467 U.S. at 902-903.

Thus, this Court's decision in Sure-Tan not only validates the denial of reinstatement and back pay remedies to workers who are not lawfully entitled to be present and employed in the United States, it requires that the Board implement and follow such a policy.

B. The Board's Selective Application of Felbro to Petitioners Must be Set Aside.

It is a well-established principle that similar situations must be treated similarly. This Court has explained:

> [T]he Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them. Thus, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."
>
> [Footnote omitted]

Teamsters Local Union 769 v. NLRB, 532 F.2d 1385, 1392 (D.C. Cir. 1976).

In order to depart from precedent or announced practices, an agency must consider and explain both the contrary rules and the reasons for the departure. Steger v. Defense Investigative Service Dept. of Defense, 717 F.2d 1402, 1406 (D.D. Cir. 1983). Even if the contrary rule is considered and rejected, the Board must explain its departure from a well established principle. Oil, Chemical & Atomic Workers International Union v. NLRB, 806 F.2d 269, 273 (D.C. Cir. 1986); Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862, 872 (D.C. Cir 1978).

Here, the Board's acquiescence to the Felbro decision only in this case was made without explanation. When its one time unexplained acquiescence is coupled with its prior and subsequent declarations that it is not bound by and will not follow Felbro, the Board has obviously violated its duty to distinguish, follow or overrule precedent. This kind of selective enforcement smacks of the very worst

sort of agency practice. See Basic Media, Ltd. v. FCC, 559 F.2d 830, 833 fn. 2 (D.C. Cir. 1977) quoting Mary Carter Paint Co. v. FTC, 333 F.2d 654 (5th Cir. 1964) (concurring opinion) (the "'law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright for a specific case.'").

The Board's actions here impose on Petitioners' back pay awards which the Board itself recognizes to be in direct contradiction to a decision of this Court and admits it will not impose in other cases. The Board's imposition of these extraordinary awards without stating any reasons to justify its action is an abuse of the Board's discretion.

C. The Felbro Decision is Wrong and Should Have Not Been Followed.

The Felbro decision is clearly wrong, bad law, and should not have been followed by the Board. The majority of the three member panel attempted to construe narrowly this Court's decision in Sure-Tan over a strong dissent. Additionally, the logical and legal underpinnings, if any, of Felbro were removed a few months after it was decided by the passage of the IRCA.

1. Felbro Was Wrong and Misread this Court's Holding in Sure-Tan.

The Ninth Circuit's decision in Felbro completely ignored the Supreme Court's holding in Sure-Tan that a worker who was "not lawfully entitled to be present and employed in the United States" "must be deemed 'unavailable' for work" and therefore is not eligible for back pay. Sure-Tan, 467 U.S. at 903. The majority in Felbro attempted to harmonize its decision with Sure-Tan by ignoring the "to be present and employed" language and stressing the illegal

aliens in Sure-Tan had left the United States whereas the workers in Felbro had remained in the United States. The majority's distinction was immaterial. Sure-Tan holds that back pay may not be awarded to a worker "not lawfully entitled to be present and employed in the United States". Thus, a worker must satisfy two criteria: lawful presence and lawfully entitled to be employed. The Felbro majority also ignored the requirement in Sure-Tan that the NLRA must be construed in harmony with, and not independent of, the immigration laws of the United States. The Board's refusal to follow Felbro in all other cases reveals just how wrong Felbro is and just how wrong the Board itself views Felbro to be.

2. The Passage of the IRCA Eviscerates Felbro.

Even if correct when decided, the passage of the IRCA has completely undermined the Felbro decision. See Fjelstad, "Comment: The National Labor Relations Act and Undocumented

Workers: Local 512 v. NLRB after the Immigration Reform and Control Act of 1986", 62 Wash. L. Rev. 595, 603 (1987). Shortly after Felbro, Congress passed the IRCA. The IRCA makes the employment of undocumented aliens, even those already in the United States, unlawful. 8 U.S.C. Section 1324A(a). The IRCA imposes civil penalties on employers who knowingly hire undocumented aliens and imposes criminal penalties on employers who demonstrate a pattern of knowingly hiring undocumented aliens. 8 U.S.C. Sections 1324A(e) and (f). Thus, the specific conduct approved of and ordered in Felbro is now a civil and criminal violation of federal law.

The IRCA eviscerated the theoretical underpinnings of Felbro. The Felbro court declared that because it was not "unlawful for an employer to hire" an illegal alien remaining in the United States, ordering back pay and reinstatement "would not impinge" on the immigration laws. Felbro, 795 F.2d at 719-720. The IRCA removes this linchpin of the Ninth

Circuit's analysis by making an award of back pay and reinstatement to an illegal alien a violation of the immigration laws. Following the enactment of the IRCA, the only way to harmonize the provisions of the NLRA and the immigration laws, as required by Sure-Tan, was outlined by the Board and its General Counsel in the memoranda: the status of the discriminatee as an undocumented worker prohibits the remedies of back pay and reinstatement for that worker. Memorandum GC 87-8; Memorandum GC 88-9. However, this analysis was rejected without explanation by the Board in this case.

Further, following the enactment of the IRCA, the issue which so concerned the Court in Felbro, the incentive for employers to hire illegal aliens because they would not be eligible for back pay claims (see Felbro, 795 F.2d at 719), has been eliminated by the IRCA's civil and criminal sanctions for employing such workers.

Accordingly, if the Felbro decision had any

theoretical support, the enactment of the IRCA eliminated it. Hence, the Board erred when it followed Felbro in this case and refused to allow inquiry into the immigration status of the Discriminatees.

3. Felbro is Factually Distinguishable from the Instant Case.

Finally, even if Felbro is good law, it is factually distinguishable. In Felbro, the discriminatees were almost immediately reinstated by the employer. Felbro, 795 F.2d at 709. The Ninth Circuit emphasized this fact to distinguish Felbro from Sure-Tan. Felbro, 795 F.2d at 717. By contrast, here many of the Discriminatees were never reemployed by the Petitioners. Also, in Felbro the discriminatees there had remained in the United States and therefore had not violated the immigration laws, a distinction crucial to the Ninth Circuit's distinguishing Sure-Tan. Id. at 722. Here the ALJ refused to allow questions about the legality of any departures from and reentry into the United States by any of the

Discriminatees (S.D., at 2). Therefore, unlike in Felbro, it is unknown whether any of the Discriminatees departed and then illegally entered the United States during the back pay period.

The ALJ also struck testimony of illegal status and ignored evidence of probable illegal status. At least one of the Discriminatees testified at the Hearing that one of the main reasons why she was unable to locate employment during the back pay period was because of her status as an illegal alien (Tr. 179-180). The ALJ struck this testimony. Another discriminatee had worked under so many aliases that the General Counsel had to bring in other witnesses to testify as to her true identity (Tr. 303-316). Yet another admitted to being in Mexico for six months, but Petitioners were not allowed to inquire as to the legality of his reentry in the United States (Tr. 193). Had the Hearing been conducted in accordance with the Board's own guidelines and in accordance with the Sure-Tan decision, evidence as to the Discriminatees'

immigration status would have been adduced. Based upon this evidence, the Board would have determined that the back pay awarded to many of the Discriminatees was improper.

D. The D.C. Circuit Erred when It Held the Ninth Circuit's Decision in Ashkenazy Created Law of the Case.

When the Regional Office began to follow Sure-Tan and the General Counsel's mandate by investigating the immigration status of the Discriminatees, the Union objected. The Union filed a motion with the Ninth Circuit seeking to prevent the Region from following Sure-Tan, and to prevent the Board from conducting any investigation into the Discriminatees' immigration status. In response to the Union's motion, the Board reversed course, abandoned the requirements of Sure-Tan, and acquiesced with the opinion in Felbro, but limited its acquiescence "only with respect to the instant case" (Response of the Board to Charging Party's Notion to Compel

Compliance with Panel Opinion, at 2). After the Board's acquiescence to the Felbro decision, the Ninth Circuit denied the Union's motion. Ashkenazy II, 817 F. 2d at 74.

The ALJ and the Board erroneously stated in their opinions that the Ninth Circuit's decision in Ashkenazy II ordered them to follow Felbro (S.D. at 1; S.D.O., at 1). The D.C. Circuit also concluded that Ashkenazy II created law of the case entitling illegal aliens to back pay. The ALJ, Board and D.C. Circuit, however, failed to explain why the Ninth Circuit's discussion of Felbro in Ashkenazy II is anything other than dictum.

In Ashkenazy II, the Ninth Circuit denied the Union's motion: "the charging party's motion to compel compliance ... is denied." 817 F.2d 74. Having denied the motion, the balance of the Ninth Circuit's decision, including its reprimand of the Board, is dictum because it does not address a pending question or the Ninth Circuit's denial of the Union's motion.

Furthermore, the Ninth Circuit's denial of the Union's motion did not compel the Board to follow Felbro. The Board elected to abide by Felbro, not a court decision compelling the Board to follow Felbro; therefore, the law of the case doctrine does not apply, because there was no judicial resolution of the issue in the Ninth Circuit's denial of the Union's motion.

As explained by this Court, the law of the case should be followed on a subsequent appeal in the appellate court, "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." Melong v. Micronesian Claims Commission, 643 F.2d 10, 17 (D.C. Cir. 1980), quoting, White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967). Here the controlling authority is Sure-Tan. Furthermore, the applicable law has been modified by an act of Congress, IRCA. Even if Felbro was correctly

decided, it is distinguishable from the facts here. Furthermore, Ashkenazy II did not establish the law of the case. Accordingly, the D.C. Circuit was not bound by Felbro and Ashkenazy II.

Thus, the Ninth Circuit's decision in Ashkenazy II did not resolve the issues presented here: (a) may the Board selectively disregard without explanation an on point decision of this Court; (b) whether Felbro is still good law; and (c) whether the Board violated Sure-Tan and the IRCA when it refused to allow inquiry into the immigration status of allegedly illegal aliens.

CONCLUSION

As is shown above, the Board's action in selectively following Felbro is this case violates the law. In fact, the Board's refusal to follow Felbro in all other cases is proper and should have happened here. Felbro was a narrow decision over a strong dissent; it was questionable when decided and has now been superseded by the provisions of the IRCA. It is

not good law. The Board's decision below was wrong, and the D.C. Circuit erred in ruling the Ninth Circuit's decision in Ashkenazy II was law of the case. It is imperative that the Court grant this petition and address the important issues presented. If the Board's decision is left to stand, back pay and reinstatement will be ordered for illegal aliens in the Ninth Circuit pursuant to Felbro and contrary to IRCA, but denied in other Circuits.

Dated: February 28, 1991

Respectfully submitted,

Stephen A. Weaver

Stephen A. Weaver
Attorney for Petitioners
ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A/ L'ERMITAGE HOTEL